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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JOHN WILEY & SONS, INC.,  
ET AL,

Plaintiffs,

v.

13 CV 816 (WHP)

BOOK DOG BOOKS, LLC, ET AL,

Defendants.

CENGAGE LEARNING, INC., ET AL,

Plaintiffs,

v.

16 CV 7123 (WHP)

BOOK DOG BOOKS, LLC, ET AL,

Defendants.

ARGUMENT

New York, N.Y.  
February 26, 2018  
5:15 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

OPPENHEIM ZEBRAK

Attorneys for Plaintiffs

BY: MATTHEW J. OPPENHEIM

MANDEL BHANDARI

Attorneys for Defendants

BY: EVAN MANDEL

ROBERT A. GLUNT

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APPEARANCES (continued)

GREENBERG TRAURIG

Attorneys for Miscellaneous Party Chegg, Inc.

BY: NINA D. BOYAJIAN (appearing via telephone)

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1 (Case called)

2 THE COURT: I'm going to deal with a number of matters  
3 here. I don't understand why every disagreement between the  
4 parties results in an urgent letter to the Court. I can tell  
5 you all that this is not the way the trial is going to proceed;  
6 that I've read some of these marathon sessions that you've had  
7 with Magistrate Judge Gorenstein. There are no more marathon  
8 sessions, okay? This is going to be a sprint to the finish for  
9 the jury. I'm going to set time limits on both sides for the  
10 trial, strict time limits, which I will enforce with a chess  
11 clock. And when your time is up, your case is over or your  
12 cross-examinations are over. Because it's about time that you  
13 understand that there have to be certain concessions to the  
14 mortality of man.

15 Now, the first dispute which I regard as emblematic of  
16 other disputes in this case is petty. It involves the  
17 plaintiffs' complaint about the number of witnesses that the  
18 defendants have identified. The defendants, quite properly,  
19 point out that they don't know precisely what the contours of  
20 the plaintiffs' case are and so it's just a protective  
21 mechanism. If the defendants want to waste their time during  
22 trial with duplicative testimony, at some point I'll just cut  
23 it off, because I don't want the jury bored to death.

24 Now, why, Mr. Oppenheim, are there still 1300 exhibits  
25 on the plaintiffs' list?

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1 MR. OPPENHEIM: Your Honor, the defendants keep  
2 throwing that around.

3 THE COURT: You can remain seated and speak into the  
4 microphone because that will be the best way for counsel on the  
5 phone to hear the proceedings.

6 MR. OPPENHEIM: Very well. Habit, your Honor.  
7 Apologies.

8 Your Honor, of those 1300, 800 of them are just books  
9 and 150 of them --

10 THE COURT: Those 800 -- I'm not too worried -- those  
11 are cited in the roadmap, right, those books?

12 MR. OPPENHEIM: Certainly the counterfeits are. I'm  
13 trying to remember whether the legitimate exemplar --

14 THE COURT: I'm worried about the other 500 exhibits  
15 that are not referred to in the roadmap.

16 MR. OPPENHEIM: So 800 are the books, 150 are images  
17 of the books as backups, in part because we didn't know whether  
18 the defendants were going to bring the books within their  
19 possession. That now significantly reduces the number of  
20 exhibits at issue. Many of the other documents are just  
21 documents underlying the roadmap.

22 THE COURT: There's 161 works at issue, right?

23 MR. OPPENHEIM: Yes, your Honor.

24 THE COURT: Why do we need 800 exhibits for 100 -- why  
25 do we need 800 books for 161 titles?

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1 MR. OPPENHEIM: Well, your Honor, first off, for each  
2 title at issue there's a counterfeit and there's a legitimate  
3 comparison copy. We will allow the jury to see some, but we're  
4 certainly not going to go through all of them, a handful of  
5 them for them to see because the defendants are contesting  
6 whether or not the books are counterfeit. So that's two for  
7 each. And for some of them there are just two.

8 THE COURT: But that takes us to 320.

9 MR. OPPENHEIM: Yes, your Honor.

10 In some instances there are multiples because they  
11 came from different places. So, for example, your Honor, the  
12 defendants have contested whether or not they distributed  
13 counterfeit copies of a particular title. And we may have  
14 received a counterfeit copy from Follett, a counterfeit copy  
15 from MBS, we may have gotten one from Chegg, we may have bought  
16 one from the defendants; and so we'll have -- since they  
17 continue to contest whether or not they'll distribute it, we'll  
18 have multiple counterfeit copies, your Honor.

19 We'll move them in, your Honor, in bulk, assuming  
20 there's no objection, and they don't want us to go through each  
21 and every one of them. But we don't want there to be any  
22 argument later, Well, you didn't present that you got books  
23 from four different sources for a particular title. Your  
24 Honor, we have far more and we've tried to reduce it, but, your  
25 Honor, this kind of leads directly into the issue of

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1 defendants' roadmap. We've tried to reduce the number that we  
2 are using. They then are using that against us to say that's  
3 the only -- those are the only counterfeits that the plaintiffs  
4 are aware of. We've only infringed that many books.

5 THE COURT: We're going to get to the motion *in limine*  
6 with respect to the defendants' roadmap in a few moments.

7 Mr. Mandel, on the witness issue, why do you need  
8 testimony from five third parties on counterfeit detection  
9 practices?

10 MR. MANDEL: As we said in the letter, your Honor, I  
11 would be surprised if we call more than two or three of those  
12 witnesses. That's really in there prophylactically. What  
13 we've got is we've got an expert who's going to testify as to  
14 market practices. That expert has been shown depositions from  
15 most or all of those parties. If we are satisfied at the end  
16 of the cross-examination of our expert on that market practice  
17 issue, we're very likely not going to call another distributor.  
18 Possibly we will call one or two more. The primary reason  
19 those five distributors are in there is because there are  
20 authenticity issues concerning documents or books produced by  
21 those parties in discovery, and the plaintiffs have already  
22 contested, such as with MBS, some of the evidence that we are  
23 putting in with respect to MBS.

24 I will also just finally globally note we were very  
25 surprised to see the plaintiffs' letter on the witness issue,

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1 because we have identified 31 live witnesses and they have  
2 identified 26 live witnesses. Unsurprisingly, those lists are  
3 substantially the same. So we don't think there's any  
4 prejudice whatsoever to plaintiffs, and we don't think there  
5 was any basis for the letter in the first place.

6 THE COURT: Look, I'm going to jump ahead, in the  
7 interest of counsel in California, and deal with the Chegg  
8 issue. And then, Ms. Boyajian, if you wish, after we've  
9 disposed of that issue, you can just alert me as to whether or  
10 not you want to remain on the conference call with the Court.

11 All right? Ms. Boyajian?

12 MS. BOYAJIAN: Yes, I said thank you, your Honor.

13 THE COURT: All right.

14 With respect to the Chegg summary, doesn't it really  
15 summarize a different set of evidence, Mr. Oppenheim?

16 MR. OPPENHEIM: I think you mean that question for  
17 Mr. Mandel; correct?

18 THE COURT: No. You object, don't you? You object to  
19 the summary to the defendants' attempt to submit a summary of  
20 data disclosed by Chegg. You say it violates Judge  
21 Gorenstein's order, right?

22 MR. OPPENHEIM: Yes, your Honor. Sorry, I  
23 misunderstood your question.

24 THE COURT: My question to you is isn't this really a  
25 different set of evidence?

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1 MR. OPPENHEIM: Your Honor, what they are trying to do  
2 is put forward, whether you call it a roadmap or you call it a  
3 summary, right, essentially a counterweight to what the  
4 plaintiffs have put forward. Now, they are trying to  
5 substantially broaden the scope of it because they are going  
6 beyond titles and they are trying to look at the  
7 industry-wide -- beyond the titles at issue and they are trying  
8 to look industry-wide. But they are essentially attempting to  
9 respond to the roadmap with this summary.

10 There was no deadline set, I will concede, for when  
11 summaries should have been presented. We put our summary  
12 forward in 2014, I believe, your Honor, maybe it was 2015. We  
13 have responded and adjusted it to issues that they have raised  
14 all along. They had an opportunity to take depositions of our  
15 witnesses about our roadmap. They have done nothing of the  
16 like; this came in very much at the very end, right after  
17 discovery is closed. Clearly Judge Gorenstein said to them,  
18 No -- they asked Judge Gorenstein, Can we put other things in?  
19 And he said no. So they said, Okay, we are not going to call  
20 this a counter roadmap or a defendants' roadmap, we'll call  
21 this a summary and put it forward. But we haven't had a chance  
22 to address it.

23 The reason that's important here is because it really  
24 does attempt to do things very different than the roadmap. And  
25 so they are putting it in for very different purposes. It is



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1 substantively problematic, your Honor.

2 THE COURT: All right. But why can't you  
3 cross-examine defendants on the problems that you note with  
4 this Chegg summary?

5 MR. OPPENHEIM: Your Honor, if they are going to  
6 start -- first off, the purpose that they want to use it for is  
7 to say, Look at the counterfeiting rate of defendants as  
8 compared to the counterfeiting rate of other distributors based  
9 on what the plaintiffs reviewed within that inventory.

10 The problem is that when the plaintiffs went in and  
11 reviewed Chegg inventory, it was very different sets of  
12 inventory. So the plaintiff said, Here are a specific set of  
13 titles that we know are likely counterfeited frequently that we  
14 want to look at for these, say, three or four different  
15 entities. But with respect to defendants, because we are in  
16 litigation with them, we want to see everything they've ever  
17 given to you. So it is not an apples-to-apples comparison.

18 For us to have to go through and explain that to the  
19 jury after they've put forward these numbers, which are  
20 absolutely not a fair statement. If you wanted to do a  
21 sampling, you could do a sampling. This is not a sampling. So  
22 they are trying to take Chegg data which is not theirs and use  
23 it for purposes it was not intended for to show something that  
24 it doesn't show.

25 If we had taken every book of every one of the other

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1 distributors, we would have had a very, very low number for the  
2 other distributors as well, but we didn't. This is going to  
3 very much mislead the jury; it's not an appropriate use of that  
4 data.

5 Also, your Honor, 14 of the additional titles that are  
6 in there are titles that we want to raise. But your Honor has  
7 precluded us by saying that we can't. So, in other words,  
8 we've got infringements from the defendants after discovery  
9 closed, so 14 titles that are in the Chegg data. So if the  
10 Chegg data comes in and we get to cross-examine because you're  
11 allowing it in and we just go to the weight, then we should be  
12 allowed to raise the issue maybe it's just big-picture, maybe  
13 it's not handing actual infringing books up, but at least raise  
14 the issue, Well, at least with respect to 14 of those titles,  
15 we know the defendants infringed them as well and we've got  
16 evidence of it.

17 THE COURT: All right. Let me turn to the issue that  
18 concerns Chegg directly. I'm directing my inquiry now to you,  
19 Ms. Boyajian.

20 As I understand it, Chegg objects to this summary data  
21 because it identifies specific suppliers, and also  
22 mischaracterizes student buybacks, and also fails to reveal  
23 that it is, in fact -- that the audit was only a subset of all  
24 of the books in the inventory of Chegg.

25 So turning to the first issue, the identity of

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1 suppliers, what would Chegg's position be if the identities  
2 were simply changed to supplier one, two, and three?

3 MS. BOYAJIAN: That would certainly alleviate some of  
4 our concerns. The concern is with respect to the suppliers.  
5 One is their actual identity, as your Honor knows; and the  
6 second is enforcing strategy. And by that, the books that we  
7 buy back --

8 THE COURT: I'm having trouble hearing you. What kind  
9 of phone are you on?

10 MS. BOYAJIAN: I'm on my landline, but I should pick  
11 up the receiver.

12 THE COURT: Yes, that makes a big difference.

13 MS. BOYAJIAN: Sure. Apologies.

14 I could start from the beginning of the argument, if  
15 your Honor would prefer.

16 THE COURT: I would.

17 MS. BOYAJIAN: Okay.

18 So the issue with the suppliers are twofold: The  
19 first is the identities, as your Honor notes. The second is  
20 the sourcing strategy, I'll call it. What I mean by that is a  
21 proportion of books that Chegg sources from one supplier as  
22 opposed to another, so what the volume is relative to --  
23 student buybacks relative to a large distributor such as MBS.  
24 And those are concerns that we have with respect to the  
25 suppliers, I think would be alleviated by what your Honor

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1 suggests.

2 What would not be alleviated is what Mr. Oppenheim  
3 noted, which is that this number, the 17 percent number,  
4 grossly misrepresents what the counterfeit problem is in  
5 Chegg's inventory, which would cause significant reputational  
6 competitive harm to Chegg. That is not the actual proportion  
7 of counterfeits in our inventory, and it's so much larger that  
8 it is damaging to our reputation.

9 THE COURT: How does it misrepresent the proportion of  
10 books in Chegg's inventory?

11 MS. BOYAJIAN: As Mr. Oppenheim explained, when the  
12 publishers came to us to do the audits, they have specific  
13 titles that tended to have higher rates of counterfeit. And  
14 they selected those titles to audit.

15 I was not 100 percent sure until Mr. Oppenheim made  
16 the representation just a moment ago that with respect to  
17 defendants, they audited the entire inventory, which is why our  
18 number is 16 or 17 percent higher than their number. It was  
19 not a pure sampling, a typical sampling, a random sampling, if  
20 you will.

21 THE COURT: All right.

22 Mr. Mandel, how does this summary make any sense then  
23 when different standards were used for each supplier?

24 MR. MANDEL: First of all, we don't know what the  
25 standards that were used. All we know is that Mr. Oppenheim's

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1 firm chose which books to review. We have not deposed  
2 Mr. Oppenheim's firm on this issue; although there are a  
3 variety of issues we could have deposed Mr. Oppenheim's firm  
4 on, we chose not to do so because we didn't want to slow down  
5 this case or interfere with it and that's just not how we  
6 practice when there's any way to avoid it.

7 We don't know that this is the case, Mr. Oppenheim's  
8 firm had sole decision-making with respect to which books were  
9 and were not inspected. To the extent that some different  
10 standard was used, that has nothing to do with the  
11 admissibility of the evidence. If anything, it goes to the  
12 weight of the evidence. If they want to respond and say, Well,  
13 actually -- and what they say in their papers is that if you  
14 did the analysis, if you looked at the defendants' books that  
15 are only the titles at issue in this case, it would be, in  
16 their words, a 500 percent higher percentage for the  
17 defendants. "500 percent" is a fancy way of saying five times  
18 more.

19 If you look at these numbers and you say, Our number  
20 is five times higher than it really is, that still shows that  
21 our numbers are a tiny fraction of the Chegg figure, and  
22 substantially in line with the two major distributors that are  
23 on here, and we'd still compare favorably to everyone else on  
24 the chart, with one exception.

25 So even if you looked at these numbers the way the

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1 plaintiffs are asking the Court to look at it -- and we have no  
2 reason to believe that they should be looked at the way  
3 plaintiffs are asking, but that's what they say -- then it  
4 still shows that, one, when they went into MBS and pulled a  
5 book off the shelf, it was no more likely to come from us than  
6 it was to come from a buyback or Chegg or the other  
7 distributors that are listed on this list. And, two, if it did  
8 ultimately come from us when they pulled a random book off  
9 MBS's shelf and then sued us claiming it came from us, that we  
10 didn't distribute it willfully, because our percentages are no  
11 higher than these other distributors.

12 MBS, for instance, was deposed in this case. The  
13 plaintiffs share a ton of information with MBS; they've trained  
14 MBS's personnel in how to detect counterfeit books. Plaintiffs  
15 don't share any information with us. Plaintiffs have never  
16 trained us on how to detect counterfeit books; yet we are just  
17 as good, if not better, than MBS at detecting counterfeit books  
18 and removing them from our inventory, according to their  
19 reading of the numbers.

20 So this is extremely persuasive evidence, even if it's  
21 interpreted in the way that plaintiffs ask for it to be  
22 interpreted, and it is absolutely mission critical for this  
23 case, which the Court has already ruled on.

24 MS. BOYAJIAN: Your Honor, if I may be heard.

25 Mr. Mandel's argument doesn't at all address Chegg's

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1 confidentiality concerns. And while defendants and plaintiffs  
2 are in a position to argue persuasiveness and reputation and  
3 what a counterfeit rate might mean for defendants, Chegg is not  
4 in that position. We're going to have our confidential  
5 information paraded out in front of our potential consumers  
6 without any opportunity to explain our position and our  
7 procedure in the policies.

8 MR. OPPENHEIM: Your Honor, may I --

9 THE COURT: Go ahead, Mr. Oppenheim.

10 MR. OPPENHEIM: This doesn't speak to what the  
11 defendants are buying and selling generally. This speaks to  
12 what they sold to Chegg, compared to what other distributors  
13 sold to Chegg. The number of books that they sold to Chegg was  
14 smaller than the other distributors. Chegg may rely much more  
15 on other distributors. It doesn't mean anything. In fact, the  
16 defendants sell a huge number of their books through their  
17 online system, Apex Media, and Chegg isn't buying them through  
18 there or, if they are, they are not being marked as defendants.

19 So this isn't representative of what the defendants  
20 are doing, this is just representative of what Chegg has  
21 received from the defendants. And to use it as a proxy to say,  
22 We're not willful because look at how less egregious our  
23 infringement is compared to others, that's exactly the kind of  
24 argument that a jury should never hear. This just shows what  
25 they're selling Chegg.

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1           This case should be about the books that we've  
2       reviewed that have come from the defendants, what they are  
3       doing internally, what they've distributed, not what Chegg has  
4       bought from the world and what Chegg's operations happen to  
5       have found and what a statistically odd sampling process for  
6       different distributors into Chegg showed. That's not what this  
7       case should be about.

8           THE COURT: All right.

9           Mr. Mandel, I'll think about this a little further,  
10      but I tell you that I think that this summary is highly  
11      misleading, because it's clear that different standards were  
12      used, and it's argumentative. But I don't want to hear -- I've  
13      heard enough on it. I'll think about it some more, but I'm  
14      going to -- and I'll issue an opinion.

15      Now, let me turn to the MBS summary.

16      MS. BOYAJIAN: Your Honor, before your Honor proceeds,  
17      may I disconnect from the call?

18      THE COURT: You may.

19      MS. BOYAJIAN: Thank you.

20      THE COURT: Have a good afternoon.

21      MS. BOYAJIAN: Good afternoon.

22      THE COURT: With respect to plaintiffs' motion *in*  
23      *limine* on the MBS summary, Mr. Oppenheim, Judge Gorenstein  
24      specifically allowed the defendants to offer a counter roadmap.  
25      I don't understand your argument as to how they waived the



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1 right to do so.

2 MR. OPPENHEIM: Yes, your Honor.

3 So that's the procedural issue we've raised; we also  
4 had a substantive issue.

5 But procedurally, your Honor, back in 2015, the  
6 defendants indicated they had objections to plaintiffs' roadmap  
7 and that there were issues they wanted to raise with it. And  
8 we said fine. And we had a meet-and-confer with Ms. Miller,  
9 their counsel of record at the time, lead trial counsel. We  
10 agreed upon a process. They designated a witness who was going  
11 to be their witness to state their objections to the roadmap  
12 and what was not included in the roadmap. And we said, Fine,  
13 we'll take his deposition.

14 We went to take his deposition; Mr. Mooney defended  
15 him. And at the deposition they said -- they stopped us from  
16 asking questions about his objections to our roadmap and said  
17 they were going to put forward their own version, so we should  
18 just wait until they did that. So we didn't follow through  
19 with the rest of the deposition and we waited. And we kept  
20 sending emails, where is it, right, we want to get it, move the  
21 process forward. And then Ms. Miller came back and said  
22 unequivocally, You should have no continuing expectation to  
23 receive a document of that nature; they have no intent on  
24 putting forward a counter roadmap.

25 We said okay.

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1           So it didn't happen.

2           Now, it's not as though that part of the litigation  
3 just doesn't matter anymore because Mr. Mandel's firm is now  
4 involved. We did what we were supposed to do. They raised  
5 objections; we created a process to address their objections;  
6 they did an about-face midway through the deposition, which was  
7 a little frustrating, but we dealt with it on the fly. They  
8 said they were going to put up something; we said okay.

9           I'm not sure what else we could have done, your Honor,  
10 but I think that you can't just erase it and say that didn't  
11 happen. There's a very clear record where they said they  
12 weren't going to put it forward, and that should mean  
13 something. Judge Gorenstein was unaware of this record at the  
14 time because the issue had not arisen before Judge Gorenstein.  
15 But the record, it really couldn't be clearer.

16           For the defendants to say it was part of a settlement  
17 dialogue, it wasn't at all. Does it sound like settlement  
18 dialogue? It wasn't at all; it was all part of a roadmap  
19 discussion. And they said, No, we are not putting one forward.

20           And then to come after discovery is closed, very late  
21 in the game, and put forward this counter roadmap, which, by  
22 the way, has all kinds of issues, and I would like to walk  
23 through the substantive issues with your Honor if we need to,  
24 but for them to now put it in on the eve of trial, it's just  
25 wrong, your Honor. It's as though what we did two years ago is

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1 irrelevant, and that can't be the case.

2 THE COURT: Mr. Mandel.

3 MR. MANDEL: Two points, your Honor.

4 First, it's not a counter roadmap. There are 161  
5 titles at issue in this case. This document does not purport  
6 to have anything to do with all 161 titles; instead, all it  
7 does is summarize two spreadsheets that MBS produced. So  
8 there's no way to construe this as some sort of counter  
9 roadmap.

10 THE COURT: First of all, you can call it whatever you  
11 want, okay, it is a counter roadmap. It's 41 titles or so that  
12 came from MBS that are involved in this litigation, right?

13 MR. MANDEL: Correct, your Honor.

14 THE COURT: Okay. Isn't it incredibly misleading?

15 MR. MANDEL: I don't think it's misleading at all,  
16 your Honor.

17 THE COURT: How can you take the plaintiffs' number of  
18 alleged counterfeits, which are exemplars, and say that that's  
19 the total number of counterfeits?

20 MR. MANDEL: To be clear, your Honor, those are not  
21 exemplars. In this case those are the total number of books  
22 that plaintiffs have educed any evidence whatsoever were  
23 counterfeit. They went to MBS; they pulled two books off the  
24 shelf, for instance; they studied those two books. They gave  
25 us an expert report that said, These two books are counterfeit.

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1 That is our evidence that you sold a counterfeit copy of this  
2 particular title, and that's the basis of our liability claim  
3 for copyright infringement here.

4 THE COURT: But plaintiffs never argued -- nor do they  
5 need to -- that those are the only specific copies that were  
6 counterfeit.

7 MR. MANDEL: I don't know if they have sufficient  
8 evidence to make the argument to the jury that any more than  
9 those two books are counterfeit. This information is no  
10 different than the information that's in their roadmap. They  
11 only identify -- where there's two titles, where there's two  
12 books that they have provided expert testimony on, their  
13 roadmap says there's two books here, here are the books, take a  
14 look at those books, and identifies them by exhibit number.

15 THE COURT: Mr. Oppenheim?

16 MR. OPPENHEIM: I think it would be useful, your  
17 Honor, to look at a particular page.

18 THE COURT: Go ahead.

19 MR. OPPENHEIM: So if you're looking at Exhibit B of  
20 our motion *in limine*, your Honor, and turn to title 10B, as in  
21 boy.

22 THE COURT: Just hang on one second.

23 MR. OPPENHEIM: Sure.

24 THE COURT: Can you work with the summary of data  
25 disclosed by MBS?

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1 MR. OPPENHEIM: If you could turn to the actual page,  
2 your Honor, I think that would help.

3 THE COURT: All right. Give me the page number.

4 MR. OPPENHEIM: It's title 10B. They don't have page  
5 numbers, but the title is called, ironically, "Business  
6 Ethics."

7 THE COURT: All right. I've got it.

8 MR. OPPENHEIM: Your Honor, let's look at this for a  
9 moment.

10 So the ISBN is right. The number of alleged  
11 counterfeits they say is one. Here's the evidence that we've  
12 presented that we know of for a certainty: We know and have  
13 presented to them a copy of a book that they've had an  
14 opportunity to review from MBS that has the defendants' sticker  
15 on it. They have seen another copy from MBS that does not have  
16 the sticker on it. They have seen records that show they  
17 bought 100 copies of this from Best Books World, who they, on  
18 at least three different instances on their own internal  
19 communications, indicated was a counterfeit supplier. They've  
20 also acknowledged that they don't have clear records of all of  
21 the purchases from Best Books World.

22 So to put forward to a jury that the plaintiffs are  
23 claiming that the defendants only sold one copy of this, A,  
24 it's wrong; and, B, it's misleading. We have no idea how many  
25 counterfeit copies of "Business Ethics" the defendants sold,

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1 but we have certainly given them evidence of far more than one.

2 And then they carry that problem down from the number  
3 of alleged counterfeits down to the percentage of defendant  
4 sales alleged to be counterfeit, because that number is just  
5 derivative of the one. So they've exacerbated the problem and  
6 then carried it over to percentage of counterfeits alleged to  
7 come from defendants to .34, all on this -- it's all built on a  
8 foundation which is false, your Honor. The only thing in here  
9 that could possibly come from the MBS data is the books  
10 purchased from defendants and books purchased from other  
11 distributors. But that's only for MBS.

12 MR. MANDEL: Your Honor, with respect to the fields at  
13 the top of this page, we copied that information from  
14 plaintiffs' roadmap. That is just background information that  
15 is designed to help the jury understand precisely what is going  
16 on. I think it's entirely appropriate. I don't think it can  
17 be prejudicial to the plaintiffs in any way since the same  
18 information is on their roadmap. And if they've got a summary,  
19 we should be allowed to use the exact same information on our  
20 summary.

21 However, if the Court is particularly concerned with  
22 these issues that Mr. Oppenheim is raising, what is mission  
23 critical to the case is the summary of the two MBS  
24 spreadsheets. I know that, so the record is clear, at the  
25 Court's request, we forwarded copies of those spreadsheets to

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1 the Court this morning via email. Those spreadsheets are  
2 impossible to understand without some kind of summary. And  
3 although I don't think there's any basis for doing this, if the  
4 Court finds the specific pages of the roadmap that go -- or the  
5 pages of the MBS summary that go title-by-title to be  
6 problematic in some way, then the spreadsheet at the beginning  
7 of the MBS summary data provides the absolutely mission  
8 critical information.

9 So going to 10B, "Business Ethics," there's a title  
10 page called "MBS Titles by the Numbers," and then I'm on the  
11 following page. And if you go to 10B, it says, Alleged  
12 counterfeits from defendants, one. And then it says, Total  
13 purchases from defendants, 17. That's the total number that  
14 MBS purchased from defendants. Total purchases of this title  
15 from others, that's 6,035. Total counterfeits found at MBS,  
16 that's 291.

17 We've submitted a revised version of this that  
18 addresses some of the plaintiffs' concerns about numbers, but  
19 then the last column is defendants' sticker on alleged  
20 counterfeits, and then there's a yes or no just to provide that  
21 information.

22 Obviously this data is most important for the books  
23 for which there was no sticker on. Those are books that  
24 plaintiffs just pulled off the shelf at MBS, and they are  
25 asking the jury to draw an inference on the basis of

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1 circumstantial evidence that defendants are the one who sold  
2 that book that they pulled off the shelf at MBS to MBS.

3 As the Court will recall during the summary judgment  
4 briefing, we argued that without the numbers that are in the  
5 spreadsheet here, without knowing how many copies MBS purchased  
6 from defendants, and how many copies MBS purchased from others,  
7 and how many copies on the shelf were found to be counterfeit,  
8 it's impossible to find by a preponderance of the evidence that  
9 it's more likely than not that we sold MBS that book. We said  
10 you need both a numerator and a denominator in order to make  
11 that analysis.

12 (Continued on next page)

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1 MR. MANDEL: Judge Gorenstein agreed with us and  
2 dismissed virtually every single claim that was based on  
3 circumstantial evidence.

4 THE COURT: Are you suggesting getting rid of all the  
5 individual title-by-title pages?

6 MR. MANDEL: I'm saying that if your Honor is  
7 concerned with the individual title-by-title pages, either  
8 because it makes it appear more similar to the plaintiff's  
9 roadmap or because the Court doesn't like some of the specific  
10 fields in that thing, what is mission critical from our  
11 perspective is making sure that the jury has access to both the  
12 numerator and the denominator. I think there's a purer -- your  
13 Honor of course disagreed with Judge Gorenstein on this issue  
14 on summary judgment and brought the 117 titles that are based  
15 on circumstantial evidence back into the case. But what there  
16 is, if this evidence is excluded, is a pure question of law,  
17 which is, if this numerator and denominator information isn't  
18 provided to the jury, can a jury ever find that it's more  
19 likely than not that we sold that book to MBS. I know that  
20 Judge Gorenstein came out one way on that issue, your Honor  
21 reversed Judge Gorenstein, but if this information is included,  
22 it makes it much easier for the jury to address this issue, and  
23 as the Court has seen the spreadsheet, the spreadsheet -- the  
24 two spreadsheets that MBS produced are impossible to understand  
25 without a summary, and it's the kind of document that is

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1 screaming for a summary to be provided.

2 THE COURT: I'll tell you that the title-by-title  
3 pages are very misleading. For instance, you characterize them  
4 as counterfeit when they just had counterfeit characteristics.  
5 You're substituting your own loaded terms, not summarizing the  
6 spreadsheet.

7 So Mr. Oppenheim, what about getting rid of all the  
8 individual title-by-title pages?

9 MR. OPPENHEIM: So your Honor, certainly that  
10 addresses one aspect of the substantive issues, but there are  
11 two other issues on that.

12 But before I go to it, it's critical to understand as  
13 a background, your Honor, that what they deem as circumstantial  
14 evidence and that the jury could never possibly tell whether or  
15 not the counterfeit books came from the defendants or not is so  
16 misleading. The records will show that they bought the books  
17 from a known counterfeit source, they sold them on sometimes  
18 the exact same day or within days, the same quantity to MBS.  
19 MBS then had counterfeits in their inventory, they turned them  
20 over. We asked the MBS witnesses: Do you believe this came  
21 from the defendants? Yes, they do. So it's not as though  
22 there's no record and the jury can decide and they can make  
23 their arguments. So the arguments are there without these  
24 numbers.

25 But let me turn to the two substantive issues on this.

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1           The first is that, I'm very confused. They fought  
2 vigorously and said they were going to call, as an expert  
3 witness, Professor Wu, who did a statistical analysis of this.  
4 Now we thought Dr. Wu's analysis was weak and should not be  
5 admitted, and we said as much in our motion *in limine*. We lost  
6 that, your Honor, but if they're bringing Dr. Wu, who did a  
7 statistical analysis on this, to then do this as well seems to  
8 be loaded for bear against us, your Honor, on presenting the  
9 evidence two different ways. This way, your Honor, it's not  
10 calculated right, and we can't figure it out why.

11           And let me explain that to you. And I have to go back  
12 historically. We received this MBS data in BDB-I. The  
13 plaintiffs, we did not ask the deponent about these  
14 spreadsheets because they're really, as compared to the other  
15 things we were asking the witness, not relevant. The  
16 defendants chose not to examine MBS on the underlying data  
17 spreadsheets either. They never asked any questions. So the  
18 case goes on. They bring this expert in who doesn't  
19 understand -- he only understands what the data is from talking  
20 to the defendants. That raises other issues, your Honor. But  
21 so be it. They realize, oh, no, we may have an issue with  
22 this.

23           After discovery is closed, they go to Judge Gorenstein  
24 and they say, your Honor, in BDB-II, there are four titles that  
25 came from MBS, and even though discovery is closed, we'd like

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1 to take MBS's deposition. And Judge Gorenstein issues an  
2 order, which you can't tell from the transcript likely he  
3 agonized over it during one of those marathon sessions, and he  
4 said, you know what, I'm going to let you do it, but this  
5 deposition is limited to those four titles and those four  
6 titles alone, and nothing else. And you'll do it  
7 telephonically, and you'll patch, you know -- so on and so  
8 forth.

9 They turned around and went to MBS and they said, if  
10 you give us a 902(11) certification, on BDB-I, we won't take  
11 your deposition on these four titles. So MBS does that.

12 Your Honor, I think that's improper. Can I cite a  
13 rule that says it's improper? No. I think it's improper. But  
14 I ask you to turn to Exhibit O and look at the 902(11)  
15 certification to see what the problem is here, your Honor.

16 THE COURT: The problem is Appendix B.

17 ATTORNEY O: Yes. Well, sorry, your Honor. Yes.  
18 Well, and the explanation of it in the declaration, your  
19 Honor -- in the certification, your Honor. It's hearsay. And  
20 when the defendants, in doing their analysis for purposes of  
21 their roadmap, defendant's roadmap, counter roadmap, summary,  
22 whatever you want to call it, the MBS analysis, all they did is  
23 look at the books coming in. They didn't look at the books  
24 that went out. So if there was a restock or a return or some  
25 other change in status by virtue of one of these adjustments,

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1 they didn't look at it. Your Honor, I don't know what effect  
2 that has, because I don't understand what each of these things  
3 is. But the way you would figure that out is in a deposition,  
4 where you would talk to the witness. But discovery is closed.  
5 They did this after discovery closed. We can't go and ask them  
6 to understand it. So we can't tell whether these numbers are  
7 right or not. All we know is that they only looked at  
8 incoming, they didn't look at outgoing.

9 THE COURT: What if I ordered it?

10 MR. OPPENHEIM: Two weeks before the trial, your  
11 Honor? Because of all of the new things that keep getting  
12 turned over last minute, we're already struggling to get ready  
13 for this trial, your Honor. And you've kicked this trial  
14 several times, which it should be a lot easier, but we're  
15 getting documents we should have gotten five years ago, your  
16 Honor. So yes, you could order it, but then we're going to sit  
17 there and they're going to do a data analysis, they're going to  
18 produce another summary, I'm going to have to have somebody go  
19 through all the numbers and check whether they're right, and  
20 we're going to meet and confer and correct it. That's a huge  
21 amount of time when we should be narrowing our case and getting  
22 our witnesses ready to put on a very succinct trial.

23 THE COURT: Mr. Mandel, how is Appendix B to the 902  
24 certification appropriate?

25 MR. MANDEL: Appendix B is just a description of the

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1 fields.

2 THE COURT: It's testimonial, isn't it?

3 MR. MANDEL: I would disagree with that, your Honor.  
4 I think it's -- they produced the spreadsheet. It's simply,  
5 they --

6 THE COURT: It interprets a business record, doesn't  
7 it?

8 MR. MANDEL: Well, there were column headings on it,  
9 and those column headings were shorthand for information. All  
10 they're telling you is what the full name of those column  
11 headings are. They could have written the entire description  
12 on those column headings. But to sort of focus the big picture  
13 issue here, have plaintiffs somehow been prejudiced by the way  
14 all of this occurred? And the answer is, absolutely not. They  
15 admit that they had this document before MBS's deposition in  
16 Book Dog Books I. Had they had concerns they wanted to raise  
17 at that time and they wanted to ask the witness about the  
18 document, they could have done so.

19 Second, they have identified MBS as a live trial  
20 witness. MBS is owned by Barnes & Noble. It's a wholly-owned  
21 subsidiary. Barnes & Noble is headquartered in New York. It's  
22 clearly subject to the court's subpoena power. And they're  
23 going to, if either party would like, appear here at trial. No  
24 deposition is necessary. They can provide this testimony live  
25 on the stand.

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1 Third, I will say, according to the plaintiffs, MBS  
2 has signed on to plaintiff's best practices. And those best  
3 practices require MBS to cooperate with the plaintiffs in their  
4 anticounterfeiting investigation. Presumably that cooperation  
5 includes not just providing documents, which they have done  
6 voluntarily throughout these cases to MBS, to the plaintiffs,  
7 but it also includes testifying, which they also did -- they  
8 were willing to do in both cases. So I have no doubt  
9 whatsoever that if the plaintiffs need additional information  
10 from MBS, either they've already obtained it or they'll have no  
11 difficulty obtaining it voluntarily, and if not, they can  
12 subpoena MBS to testify at this trial.

13 THE COURT: All right. Let me turn to one final  
14 issue: The declarations that are cited in the plaintiff's  
15 roadmap.

16 First, I've reviewed the defendant's objections to the  
17 exhibits cited in the plaintiff's roadmap, all 772 of them. I  
18 can tell you that I'm not persuaded by any of those objections  
19 other than the objections that are raised with respect to  
20 Plaintiff's Exhibits 63, 73, and 84, which are the  
21 declarations. Who are these individuals, Mr. Oppenheim, and  
22 how did the plaintiffs get in touch with them?

23 MR. OPPENHEIM: So your Honor, during the course of  
24 BDB-I, at some point we became aware of certain titles having  
25 been sold by the defendants to certain customers and that they

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1 had come from a known counterfeit source, and we reached out to  
2 those individuals and asked whether we could buy the book back  
3 from them when they were done with it, or something to that  
4 effect. And a handful of them responded and they sent us the  
5 books, and they were in fact counterfeit. It confirmed -- the  
6 defendants were saying, well, just because you found something  
7 in our inventory or just because it was sold to us by a  
8 counterfeit supplier, you can't show that it was actually  
9 distributed. So this was a way for us to identify that these  
10 books had actually been distributed to these sources. And they  
11 signed declarations, and we reviewed the books, and we made it  
12 all available to the defendants so that if they wanted, they  
13 could take these people's deposition if they wanted, they could  
14 look at the books if they wanted. They had access to all of it  
15 for several years now. And it just further supports the  
16 existing claims, your Honor.

17 THE COURT: Did any of these individuals, these three  
18 individuals receive any compensation?

19 MR. OPPENHEIM: I think we gave them a \$10 Starbucks  
20 card, your Honor.

21 THE COURT: And the defendants were afforded an  
22 opportunity to depose them?

23 MR. OPPENHEIM: They've had these -- we produced them  
24 immediately in BDB-I, your Honor, so they've had them for  
25 several years.



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1 THE COURT: All right. Mr. Mandel, what factors weigh  
2 against admitting these declarations under the residual  
3 exception? I mean, they're pretty cut and dry, aren't they?

4 MR. MANDEL: I don't have them in front of me and I  
5 didn't know this was going to be discussed. I've read them  
6 some months ago.

7 THE COURT: Well, as I say, out of the 772 objections  
8 that were lodged, there's only three that attracted my  
9 attention. I'm overruling all the other ones.

10 MR. MANDEL: I understand, your Honor. You know, I  
11 don't know if they ever identified in BDB-I these individuals  
12 as witnesses. They were on their 26(a) disclosure. Unless and  
13 until they're identified on their 26(a) disclosure, there's no  
14 reason for the defendants to depose them. But as a general  
15 matter, and in my experience, courts do not entertain the  
16 admissibility of declarations at trial. So it would not have  
17 occurred to me that I needed to depose someone just because the  
18 other side produced a declaration. If they wanted testimony  
19 from that person, they will produce that person at trial and  
20 I'll be able to cross-examine that person at trial. I  
21 understand that depositions are common in civil practice, but  
22 they're not required, and you're allowed to confront witnesses  
23 at the trial.

24 So for all those reasons, I don't think the  
25 declarations should come in.

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1 THE COURT: Well, do you have anything to suggest that  
2 they're faulty or in some fashion fraudulent?

3 MR. MANDEL: We have no idea how these people were  
4 compensated.

5 THE COURT: He just said they got a \$10 Starbucks  
6 card.

7 MR. MANDEL: Actually, your Honor, he said two  
8 different things that were inconsistent with each other. First  
9 he said that they offered to buy the books back from them and  
10 then later, when your Honor asked about compensation, he said  
11 it was a Starbucks card. So it's not clear to us from what  
12 we've heard whether they offered to buy -- they actually bought  
13 them back and, if so, at what price did they buy them back; and  
14 two, we don't know about these Starbucks cards. So I think  
15 there's a compensation issue.

16 Second, it's not clear -- you know, the way students  
17 behave, it's not entirely clear that at the end of the semester  
18 every student winds up with the book they had at the beginning  
19 of the semester. You're in a class with possibly hundreds of  
20 other people, you're studying with other people, and had there  
21 been a deposition or if there's going to be trial testimony, we  
22 would inquire as to whether they're sure that they didn't swap  
23 books with their roommate or their classmate or whatever. And  
24 the issue is an authenticity issue.

25 MR. OPPENHEIM: Your Honor, to the issue of

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1 communications with these witnesses, we turned over all of  
2 them, so the letter that says the \$10 Starbucks card, they have  
3 all those communications. They have everything. They've had  
4 them for years.

5 THE COURT: Did you buy back the books?

6 MR. OPPENHEIM: Actually, I think we gave them another  
7 copy. We swapped out, gave them another copy of the book, and  
8 took the one that they had, and then gave them a \$10 Starbucks  
9 card on top of it. That's my recollection. I don't have the  
10 documents right in front of me, your Honor, but they have them.  
11 They also provided to us, your Honor, the documents showing  
12 they bought the books from the defendants. So we contacted the  
13 individuals, they say yes, I bought it from the defendants,  
14 here's my Amazon receipt, here's the book, and, you know, so  
15 they're free to argue, well, you don't know that maybe it was  
16 swapped in the classroom. They're free to make that argument  
17 to the jury. I don't think anybody's going to believe it, but  
18 they can make it.

19 THE COURT: All right. Counsel, I think I've heard  
20 enough. I'll issue some short orders on these outstanding  
21 issues in the next week or so, during the hours of the day when  
22 I'm not trying a criminal case.

23 MR. OPPENHEIM: Very well, your Honor. May I ask --  
24 I'm sorry.

25 THE COURT: Yes.

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1 MR. OPPENHEIM: Would it be all right for us to  
2 coordinate with your clerk on the issue of bringing evidence  
3 into the courtroom for the purposes of the trial?

4 THE COURT: Yes, of course. All right. That will be  
5 fine. And any equipment that you want to bring in or any  
6 electronic devices, submit orders to me. But be parsimonious  
7 about the number of electronic devices that you want to bring  
8 in because recently I had a matter where lawyers had 20 people  
9 bringing in a variety of devices, and I said fine, two people  
10 bringing in just a couple devices. Because that's not going to  
11 get past the security committee, and I wouldn't even purport to  
12 sign off on something like that. All right?

13 MR. OPPENHEIM: Very well, your Honor.

14 THE COURT: And that means attorneys in the case or  
15 people in your firm, not clients. Okay? Clients can't bring a  
16 cellphone in here or another device.

17 Have a good evening.

18 ALL COUNSEL: Thank you, your Honor.

19 THE COURT: Decision reserved.

20 THE DEPUTY CLERK: All rise.

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